

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of
C&W ENTERPRISES, INC.
Petition for Waiver of the FCC's Rules Regarding
Transition of Broadband Radio Service and
Educational Broadband Service to the Revised
Band Plan

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 2009

Released: April 17, 2009

By the Associate Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Wireless Telecommunications Bureau (WTB or Bureau) has before it a request by C&W Enterprises, Inc. (C&W), seeking a waiver of Sections 27.1230-27.1239 of the Commission's Rules for itself and its Educational Broadband Service (EBS) lessors for a period of six years. C&W has demonstrated that a temporary waiver is necessary for it to continue serving its customers as it has since 1991. We therefore grant C&W's Waiver Request to the extent indicated herein.

1 Request for Limited Waiver (filed Apr. 30, 2007) (Waiver Request). Sections 27.1230-27.1239 of the Commission's rules concern the transition of Broadband Radio Service (BRS) and Educational Broadband Service (EBS) to the band plan adopted by the Commission in the BRS/EBS Report and Order. 47 C.F.R. §§ 27.1230-27.1239. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (BRS/EBS R&O and FNPRM as appropriate).

2 C&W is the licensee for Stations WMX908 (Channels E1-E4); WLW827 (Channels F1-F4); WNCT543 (Channel H1); WMH612 (Channel H2); and WML478 (Channel BRS-1).

3 C&W's lessors are as follows: Station WLX334 (Channels A1-A4) (Water Valley Independent School District); Station WNC914 (Channels B1-B4) (Grape Creek Independent School District); Station WNC723 (Channels C1-C4) (Texas State Tech. Inst.); Station WLX758 (Channels D1-D4) (Water Valley Independent School District); and WND265 (Channels G1-G4) (Hardin Simmons University).

4 On May 24, 2007, the Broadband Division/WTB released a Public Notice seeking comment on the waiver request. Comments were due on June 25, 2007 and replies were due on July 10, 2007. Wireless Telecommunications Bureau Seeks Comment on Request by C&W Enterprises, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, Public Notice, 22 FCC Rcd 9410 (WTB BD 2007).

II. BACKGROUND

2. On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking (BRS/EBS R&O)* that transformed the rules and policies governing the licensing of services in the 2500-2690 MHz band.⁵ Prior to the *BRS/EBS R&O*, the technical rules and band plan for the 2500-2690 MHz band were designed primarily to promote wireless cable and educational television services, which resulted in licensees receiving interleaved channel groups instead of contiguous channel blocks.⁶ In most areas of the country, however, the deployment of wireless cable was not successful.

3. Consequently, in the *BRS/EBS R&O*, the Commission developed a new band plan and technical rules that permit a range of new and innovative wireless services in the 2500-2690 MHz band and give licensees contiguous channel blocks.⁷ The new band plan consists of two low-power segments, the Lower Band Segment (LBS) and the Upper Band Segment (UBS), and a high-power segment, the Middle Band Segment (MBS).⁸ The channel configuration and the technical rules for the LBS and UBS are designed to permit a range of wireless services.⁹ The MBS, in contrast, consists of seven high-power channels and is designed for the transmission of video programming, for those licensees that still wish to provide such programming.¹⁰ The *BRS/EBS R&O* further established a plan to transition EBS and BRS licensees from their interleaved channel locations to their new channel locations in the LBS, UBS, or MBS.¹¹ Not all licensees, however, are required to transition to the new band plan and technical rules. The *BRS/EBS R&O* permitted a limited number of Multichannel Video Programming Distributors (MVPDs) to seek a waiver from the Commission to “opt-out” of the transition, thus permitting them to continue their high-power, high-site operations throughout the entire 2500-2690 MHz band.¹² On April 27, 2006, the Commission released the *Third Memorandum Opinion and Order and Second Report and Order (3rd MO&O)*, in which it affirmed its decision to consider these waivers on a case-by-case basis.¹³

4. C&W has been providing MVPD services in the San Angelo, Texas area since 1991 and has been providing wireless internet service to that area since 2001.¹⁴ It currently provides MVPD service

⁵ See *BRS/EBS R&O* and *FNPRM*.

⁶ In the EBS and BRS services, channels are usually licensed in groups of four. When EBS was created, EBS reception equipment could not receive adjacent channels without interference. Thus, the Commission interleaved the A block channels with the B block channels, the C block channels with the D block channels, the E block channels with the F block channels and the G block channels with the H block channels. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, WT Docket No. 03-66, 18 FCC Rcd 6722, 6744 ¶ 47 (2003) (*NPRM*).

⁷ See *BRS/EBS R&O*, 19 FCC Rcd at 14168 ¶ 4.

⁸ *Id.* at 14169 ¶ 6.

⁹ *Id.* at 14168 ¶ 4.

¹⁰ *Id.* at 14185-14186 ¶ 4.

¹¹ *Id.* at 14197-14198 ¶ 72.

¹² *Id.* at 14199-14200 ¶ 77.

¹³ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5645 ¶ 72 (2006) (*BRS/EBS 3rd MO&O*). In the *3rd MO&O*, the Commission also granted WATCH TV’s request to opt-out of the transition of the 2.5 GHz band in Lima, Ohio. *Id.* at ¶ 84.

¹⁴ Waiver Request at 3.

to approximately 2,500 customers and broadband services to approximately 2200 residential and business customers.¹⁵ It began providing Voice over Internet Protocol service in the first quarter of 2006.¹⁶ C&W's primary competitor is Sudden Link, a cable system that serves San Angelo but not the surrounding rural counties.¹⁷

5. C&W asks on behalf of itself and its EBS lessors to "opt-out" of the transition of the 2500-2690 MHz band in the greater San Angelo, Texas metropolitan area as well as surrounding underserved rural areas and seeks a waiver of Section 27.1230-27.1239 of the Commission's Rules for itself and all of its lessors.¹⁸ In addition, C&W requests that the waiver state that:

- C&W and its EBS lessors will be able to postpone transitioning its San Angelo GSA until six years after public notice of a grant of its request for a limited waiver. C&W is to transition its BRS licenses, as well as all five EBS channel groups leased to it, by the end of this six year period and to file a post-transition certification notice by no later than 30 days after the conclusion of this six year period;
- During the limited waiver period, C&W and its EBS lessors will be permitted to continue operating pursuant to Section 27.1209 on the "pre-transition" BRS/EBS band plan set forth in Section 27.5(i)(1), as such may be modified in the future to accommodate the eventual displacement of C&W's operations on BRS channel 1 from the 2150-2156 MHz band to new spectrum for the benefit of Advanced Wireless Service licensees at 2150-2155 MHz, if the AWS entrant initiates such a migration of C&W's services on its BRS channel 1 during this period;
- During the limited waiver period, C&W and its EBS lessors will participate in good faith in any transition planning process relating to any geographic area that overlaps its GSA. In conjunction with any transition, C&W and its EBS lessors will subsequently make such modifications to their facilities at the Proponent's expense as the Proponent may reasonably request in an effort to reduce interference to licensees in other markets that are transitioning, provided that such modifications can be accomplished without cumulatively resulting in more than *de minimis* reduction in C&W's ability to serve its then-existing subscribers;
- During the limited waiver period, C&W's main transmit site shall be permitted to continue operating under the maximum EIRP limits set forth for "pre-transition" operations in Section 27.50(h);
- During the limited waiver period, all channels used for the transmission of video programming on C&W's system shall be permitted to continue operating under the "pre-transition" emission limits for such as set forth in Section 27.53(l)(1);
- During the limited waiver period, all of the BRS and EBS channels in C&W's system will be permitted to operate at any point along their respective GSA boundaries at the greater signal strength of 47 dBu or the strength authorized in their underlying licenses as of January 10, 2005, in conjunction with Section 27.55(a)(4)(i);

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 1.

- During the limited waiver period, Sections 27.1220 (regarding the 5.5 MHz wide channels in the LBS and UBS) and 27.1222 (regarding the establishment of guard bands around the MBS) shall not be applicable to C&W and its EBS lessors; and
- C&W and its EBS lessors shall not be subject to the height benchmarking obligations set forth in Section 27.1221.¹⁹

C&W argues that it is eligible to apply for an opt-out waiver, as C&W both meets the definition of a multichannel video programming distributor (MVPD) and claims that it serves approximately nine percent of the households within its GSA, thereby meeting the standard of five or more percent of the households in the GSA.²⁰

6. Transition initiation plans have been filed for six BTAs adjoining or adjacent to C&W's BTA – Midland, Texas; San Antonio, Texas; Austin, Texas; Brownwood, Texas; Abilene, Texas; and Odessa, Texas.²¹ In each of those plans, the proponent certified that it would not be necessary to transition C&W's system in order to transition their BTAs.²²

7. On June 25, 2007, Clearwire Corporation (Clearwire), Sprint Nextel Corporation (Sprint Nextel), Xanadoo, LLC (Xanadoo), and NextWave Wireless, Inc. (NextWave) filed comments²³ addressed to the eleven opt-out waiver requests on which the Bureau had sought comment.²⁴ On July 10, 2007, the

¹⁹ *Id.* at 14-15.

²⁰ *Id.* at 5-6.

²¹ See Letter from Terri B. Natoli, V.P. Regulatory Affairs & Public Policy, Clearwire Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Nov. 9, 2006) (Clearwire Midland, Texas Initiation Plan); Letter from Terri B. Natoli, V.P. Regulatory Affairs & Public Policy, Clearwire Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Dec. 8, 2006) (Clearwire San Antonio, Texas Initiation Plan); Letter from Robert H. McNamara, Director, Spectrum Management, Government Affairs, Sprint Nextel Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Feb. 1, 2007) (Sprint Nextel Austin, Texas Initiation Plan); Letter from Robert H. McNamara, Director, Spectrum Management, Government Affairs, Sprint Nextel Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Feb. 12, 2007) (Sprint Nextel Brownwood, Texas Initiation Plan); Letter from Terri B. Natoli, V.P. Regulatory Affairs & Public Policy, Clearwire Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Feb. 14, 2007) (Clearwire Abilene, Texas Initiation Plan); Letter from Terri B. Natoli, V.P. Regulatory Affairs & Public Policy, Clearwire Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (dated May 22, 2007) (Clearwire Odessa, Texas Initiation Plan).

²² See *id.* As required by 47 C.F.R. § 27.1231(f)(1)(iv), each of the transition plans identified instances in which it would be necessary to transition licensees in adjacent or adjoining BTAs in order to avoid interference to licensees in the BTA being transitioned. None of the transition initiation plans in question mentioned any of the stations that constituted C&W's system.

²³ Letter from Terri B. Natoli, Vice President, Regulatory Affairs & Public Policy, Clearwire Corporation, Trey Hanbury, Director Spectrum Proceedings, Sprint Nextel Corporation, Cheryl Crate, Vice President, Government and Public Relations, Xanadoo, LLC, and Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless, Inc. to Marlene H. Dortch, Federal Communications Commission (dated Jun. 25, 2007) (Joint Comments).

²⁴ On June 25, 2007, the Commission had pending before it opt-out waiver requests from C&W; Starcom, Inc.; Central Texas Communications, Inc.; Choice Communications LLC; CNI Wireless, Inc.; Dakota Central Telecommunications Cooperative *et al*; Evertek, Inc.; Northern Wireless Communications Inc.; RC Technologies Corporation; Northwest Communications Cooperative; and United Telephone Mutual Aid Corporation. Wireless Telecommunications Bureau Seeks Comment on Request by C&W Enterprises, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9410 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by RC Technologies Corporation for Waiver of the

National ITFS Association (NIA) and the Catholic Television Network (CTN) filed comments addressed to the eleven opt-out waiver requests on which the Bureau had sought comment.²⁵ Also on July 10, 2007, C&W, Northwest Communications Cooperative (NCC); Central Texas Communications, Inc. (CTC), Choice Communications LLC (Choice), CNI Wireless, Inc. (CNI), Dakota Central Telecommunications Cooperative (Dakota Central), Evertek, Inc. (Evertek), Northern Wireless Communications Inc. (Northern), RC Technologies Corporation (RC Technologies), Starcom, Inc. (Starcom), and United Telephone Mutual Aid Corporation (United) (collectively, Waiver Proponents) filed a letter in reply to the Joint Commenters.²⁶ On July 17, 2007, C&W, NCC, CTC, Choice, Dakota Central, Evertek, Northern, RC Technologies, Starcom, and United responded to the comments filed by CTN and NIA.²⁷ On July 19, 2007, Clearwire, Sprint Nextel, Xanadoo, and NextWave filed comments in response to the Joint Reply.²⁸

Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9364 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Central Texas Communications, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9414 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Choice Communications LLC for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9357 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by CNI Wireless, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9368 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Dakota Central Telecommunications Cooperative *et al* for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9371 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Evertek, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9361 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Northern Wireless Communications Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9394 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Northwest Communications Cooperative for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9378 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by Starcom, Inc. for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9401 (WTB BD 2007); Wireless Telecommunications Bureau Seeks Comment on Request by United Telephone Mutual Aid Corporation for Waiver of the Requirement to Transition to the New BRS/EBS Band Plan, *Public Notice*, 22 FCC Rcd 9404 (WTB BD 2007).

²⁵ Letter from Todd D. Gray, National ITFS Association and Edwin N. Lavergne, Catholic Television Network to Marlene H. Dortch, Federal Communications Commission (filed Jul. 10, 2007) (CTN/NIA Letter).

²⁶ Letter from Stephen E. Coran, Counsel to RC Technologies Corporation, Dakota Central Telecommunications Cooperative, Northern Wireless Communications Inc., Starcom, Inc., and United Telephone Mutual Aid Corporation, Paul J. Sinderbrand, Counsel to CNI Wireless, Inc., Cheryl A. Tritt, Counsel to Choice Communications LLC, Donald L. Herman, Jr., Counsel to Central Texas Communications, Inc., David L. Nace, Counsel to Evertek, Inc. and NCC, and Suzanne S. Goodwyn, Counsel to C&W Enterprises, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Jul. 10, 2007) (Joint Reply Comments).

²⁷ Letter from Stephen E. Coran, Counsel to RC Technologies Corporation, Dakota Central Telecommunications Cooperative, Northern Wireless Communications Inc., Starcom, Inc., and United Telephone Mutual Aid Corporation, Cheryl A. Tritt, Counsel to Choice Communications LLC, Donald L. Herman, Jr., Counsel to Central Texas Communications, Inc., David L. Nace, Counsel to Evertek, Inc. and NCC, and Suzanne S. Goodwyn, Counsel to C&W Enterprises, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Jul. 17, 2007) (Second Joint Reply Comments).

²⁸ Letter from Terri B. Natoli, Vice President, Regulatory Affairs & Public Policy, Clearwire Corporation, Trey Hanbury, Director Spectrum Proceedings, Sprint Nextel Corporation, Cheryl Crate, Vice President, Government and Public Relations, Xanadoo, LLC, and Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless, Inc. to Marlene H. Dortch, Federal Communications Commission (dated Jul. 19, 2007) (Second Joint Comments).

On July 25, 2007, NCC, CTC, Dakota Central, Evertek, Northern, RC Technologies, Starcom, and United responded to the Second Joint Comments.²⁹

8. The Joint Commenters, along with CTN and NIA, oppose the grant of permanent, unconditioned opt-out waivers of the transition rules going forward.³⁰ The Joint Commenters argue that the permanent opt-out waiver requests granted to date have foreclosed the ability of 2.5 GHz licensees and consumers in service areas covered by opt-out grants to benefit from changes in technology that may enable transition while still accommodating MVPD operator needs. They request that any opt-out waiver requests deemed meritorious should only be granted a waiver limited in time to no later than December 31, 2008.³¹ The Joint Commenters also argue that any waiver should be conditioned upon compliance with existing Part 27 operational and technical rules.³² The National ITFS Association and the Catholic Television Network support the position of the Joint Commenters.³³ The Waiver Proponents argue that the Joint Commenters are attempting to contravene the Commission's repeated and consistent determinations that waivers of the BRS/EBS band plan transition rules should be considered on a case-by-case basis in light of the facts and circumstances of the particular waiver requests.³⁴ The Joint Commenters respond that applying a time limitation to any waivers granted would be entirely consistent with the Commission's prior determination that it would follow a case-by-case approach, because it could revisit and extend any waivers if subsequent conditions were to justify doing so.³⁵

III. DISCUSSION

9. In the *BRS/EBS R&O*, the Commission found that it is in the public interest to consider waivers of the rules requiring licensees to transition to the new band plan and to comply with the new technical rules.³⁶ Specifically, the Commission found that it is in the public interest to consider waivers on a case-by-case basis for those operators or their affiliates that meet the definition of a multichannel video programming distributor in Section 522 of the Communications Act of 1934, as amended, and that provide MVPD service to five percent or more of the households within their respective geographic service areas (GSAs).³⁷ The Commission further found that it is in the public interest to consider waivers for any BRS or EBS licensee that is co-located with any qualified MVPD licensee that elects to opt-out.³⁸ In addition, the Commission found that it is in the public interest to consider waivers for those BRS

²⁹ Letter from Stephen E. Coran, Counsel to RC Technologies Corporation, Dakota Central Telecommunications Cooperative, Northern Wireless Communications Inc., Starcom, Inc., and United Telephone Mutual Aid Corporation, Donald L. Herman, Jr., Counsel to Central Texas Communications, Inc., and David L. Nace, Counsel to Evertek, Inc. and NCC to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Jul. 25, 2007) (Third Joint Reply Comments).

³⁰ Joint Comments at 3.

³¹ *Id.* at 3.

³² *Id.* at 3-4.

³³ CTN/NIA Letter.

³⁴ Joint Reply Comments at 2-3, *citing BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 76, and *BRS/EBS 3rd MO&O*, 21 FCC Rcd at 5645-5646 ¶¶ 72-73.

³⁵ Second Joint Comments at 3.

³⁶ *BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 77.

³⁷ *BRS/EBS R&O*, 19 FCC Rcd at 14199 ¶ 77. This calculation is made in accordance with the requirements of 47 C.F.R. § 76.905(c).

³⁸ *Id.*

licensees that have a viable business for high-powered operations, but who need more than seven digitized high-powered MBS channels to deliver their service to their customers.³⁹

10. The Commission stated that, in reviewing requests to waive the rules, it would consider the actions taken by MVPD or BRS licensees to minimize the effect of interference on neighboring markets, as well as the licensee's explanation as to why it cannot work within the transition rules adopted by the Commission.⁴⁰ The Commission stated that waivers will be granted if it is shown that: (i) the underlying purpose of the rules(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁴¹ While C&W claims that it provides MVPD service to nine percent of the households within its geographic service area,⁴² it fails to provide any information to verify that claim. Accordingly, C&W has failed to show that it exceeds the minimum five percent benchmark of the *BRS/EBS R&O* noted above. We therefore consider C&W's request under the general waiver standard contained in Section 1.925 of the Commission's Rules.⁴³

11. At the outset, we agree with the Joint Commenters that opt-out waiver requests should be closely scrutinized to determine what effect such waivers would have on the ability of nearby operators to provide service. None of the Joint Commenters, however, has alleged that it would be harmed if C&W is granted a waiver. The Joint Commenters, however, do not base their proposals to terminate any waivers at the end of 2008 and to require compliance with the post-transition technical rules upon an individual analysis of C&W's situation. The Joint Commenters have not established that December 31, 2008 is an appropriate date with respect to C&W, nor do they attempt to show that C&W could operate its video system under the post-transition rules. Furthermore, we agree with C&W and the other Waiver Proponents that arbitrarily establishing December 31, 2008 as the outer deadline for any waiver would be inconsistent with the Commission's decision to evaluate waiver requests on a case-by-case basis. The Joint Commenters' suggestion that a waiver could be renewed after the end of 2008 if circumstances supported an extension at that time would fail to provide C&W with the certainty it needs to conduct its operations. Thus, we deny all requests to limit any waiver granted to C&W to December 31, 2008, and proceed with an individual analysis of the merits of C&W's Waiver Request.

12. C&W has shown that, in view of its unusual circumstances, requiring it to transition to the new band plan and technical rules would be inequitable, unduly burdensome, and contrary to the public interest. Initially, we note that C&W is the licensee or lessee of all BRS and EBS spectrum in San Angelo, Texas, except for BRS Channel 2.⁴⁴ C&W has shown that, in view of its unusual circumstances, requiring it to transition to the new band plan and technical rules would be inequitable, unduly burdensome, and contrary to the public interest. Requiring C&W to digitize its system to fit within the MBS "would require an investment of millions of dollars that would financially devastate C&W . . ."⁴⁵

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*, 19 FCC Rcd at 14199-14200 ¶ 77, 47 C.F.R. § 1.925(b)(3).

⁴² *Id.* at 6.

⁴³ 47 C.F.R. § 1.925.

⁴⁴ Waiver Request at 2. Channel BRS2 is licensed to CTC Communications, Inc., as is the San Angelo BTA authorization. *Id.* at n.3.

⁴⁵ Waiver Request at 3.

Requiring C&W to transition at this time would force it to cease providing MVPD service to customers who have no access to cable service and whose only alternative would be DBS service.⁴⁶ So long as C&W can demonstrate that it has a viable business and that it can operate without causing interference to nearby systems, we conclude that it would be inequitable and contrary to the public interest to require C&W to transition.

13. C&W has shown that it has developed a viable business. Over the past sixteen years, C&W has been able to establish a successful business providing not only wireless cable to the citizens of San Angelo, Texas, but also broadband services and, most recently, Voice over Internet Protocol (VoIP).⁴⁷ Notably, C&W has established a wireless cable business when most other entities could not, it has remained in business for sixteen years, and has continued its commitment to developing its business by, for instance, developing innovative design to utilize its spectrum effectively and profitably,⁴⁸ and by deploying VoIP service to its customers.

14. We also find that C&W has adequately addressed interference issues. C&W's transmitter site is geographically isolated and terrain shielded from many of the surrounding GSAs.⁴⁹ Clearwire, CTC, Coleman County Cooperative, Inc. (CCCI), and Xanadoo, which operate facilities, north, east, northeast, and adjacent to San Angelo, respectively, all appear to be terrain shielded from C&W's operation, therefore, the systems would appear to operate with minimal or no interference.⁵⁰ C&W and CTC entered into a Market Settlement Agreement with Heartland Wireless Communications in 1997, agreeing that the operations would be mutually acceptable and that any interference between the parties would be *de minimis*.⁵¹ CTC's operation in Lohn, Texas would be the closest operation (approximately 70 miles or 114 kilometers) to C&W's station in San Angelo.⁵² Because these stations are presently in operation without interference, we concur with C&W that facilities operating within the area of San Angelo will not bear an additional burden operating their facilities if C&W's Waiver Request is granted.

15. C&W states that there are communities in the valley to which neither C&W nor CTC can provide service because of the terrain.⁵³ Therefore it appears that the terrain within the area not only prevents communities within the valley from receiving service but also provides protection between the operations. C&W has not received any interference complaints from its operation.⁵⁴ We note as well that the lack of interference problems is attested to in the Initiation Plans submitted by proponents planning to transition the potentially affected BTAs.⁵⁵

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 2-3.

⁴⁸ *Id.* at 7-8.

⁴⁹ *Id.* at 8-10.

⁵⁰ *Id.* at 8-10.

⁵¹ *Id.* at 9.

⁵² *Id.* at 8.

⁵³ *Id.* at 8-9.

⁵⁴ *Id.* at 9-10.

⁵⁵ See Clearwire Midland, Texas Initiation Plan, Clearwire San Antonio, Texas Initiation Plan, Sprint Nextel Austin, Texas Initiation Plan, Sprint Nextel Brownwood, Texas Initiation Plan, Clearwire Abilene, Texas Initiation Plan, Clearwire Odessa, Texas Initiation Plan.

16. In view of the unique geographical location of C&W's transmission antenna, and in view of the nature of the surrounding terrain, we believe that C&W would not cause interference to new broadband services in the new bandplan. Moreover, there are no technical objections to C&W's request for waiver not to transition to the new band plan from any of the multiple operators that surround C&W.

17. With respect to potential aggregate harm resulting from the collective grant of pending opt-out waiver requests, we conclude that our grant of opt-out waivers will not, separately or in the aggregate, result in any meaningful harm to Sprint, Clearwire, or other entities that wish to provide advanced broadband services in the 2.5 GHz band. A total of fifteen MVPD opt-out waiver requests have been filed. Those systems collectively serve fewer than 50,000 subscribers and cover only approximately 160 out of 5,289 active BRS and EBS licenses. Given the largely rural locations for which waivers have been sought, and our conclusions that the waivers we have granted to date will have relatively minimal impact on nearby licensees, we believe our decisions will not adversely impact licensees who wish to use this band for low-power, cellularized broadband services, even if all of the waivers were ultimately granted. If the licensees requesting opt-out waivers had chosen instead to provide low-power cellularized services, nearby licensees would still have been required to protect the service areas of the opting-out licensees. Finally, since the deadline for filing opt-out waiver requests has expired,⁵⁶ licensees who wish to offer low-power, cellularized broadband services can now plan with certainty knowing that no other such requests will be entertained.

18. We have reviewed the conditions proposed by C&W. We note that C&W requests a waiver for six years, and we find this term reasonable. We find that it is not necessary to give C&W an open-ended waiver of the rules relating to power limits and the height benchmarking rule. Indeed, in light of the terrain shielding between C&W and nearby systems, it is unclear whether C&W needs a waiver of the height benchmarking rule. We believe the best approach is to limit waivers of those rules to allow C&W to maintain its current operations. Accordingly, we grant C&W's Waiver Request to the following extent with the following conditions:

- During the pendency of this Waiver Request, C&W and its EBS lessors will be permitted to continue operating pursuant to Section 27.1209 on the "pre-transition" BRS/EBS band plan set forth in Section 27.5(i)(1), as such may be modified in the future to accommodate the eventual displacement of C&W's operations on Channel BRS1 from the 2150-2156 MHz band to new spectrum for the benefit of Advanced Wireless Service licensees at 2150-2155 MHz, if the AWS entrant initiates such a migration of C&W's services on its Channel BRS1 during this period;
- C&W and its EBS lessors will participate in good faith in any transition planning process relating to any geographic area that overlaps its GSA. In conjunction with any transition, C&W and its EBS lessors will subsequently make such modifications to their facilities at the Proponent's expense as the Proponent may reasonably request in an effort to reduce interference to licensees in other markets that are transitioning, provided that such modifications can be accomplished without cumulatively resulting in more than a *de minimis* reduction in C&W's ability to serve its then-existing subscribers;
- C&W's main transmit site shall be permitted to continue operating at the EIRP used as of April 30, 2007;
- All channels used for the transmission of video programming on C&W's system shall be permitted to continue operating under the "pre-transition" emission limits for such as set forth in Section 27.53(l)(1);

⁵⁶ See 47 C.F.R. § 27.1231(g) (establishing April 30, 2007 deadline).

- During the limited waiver period, all of the BRS and EBS channels in C&W's system will be permitted to operate at any point along their respective GSA boundaries at the greater signal strength of 47 dBuV/m⁵⁷ or the strength authorized in their underlying licenses as of January 10, 2005, in conjunction with Section 27.55(a)(4)(i);
- During the limited waiver period, Sections 27.1220 (regarding the 5.5 MHz wide channels in the LBS and UBS) and 27.1222 (regarding the establishment of guard bands around the MBS) shall not be applicable to C&W and its EBS lessors; and
- Section 27.1221 of the Commission's Rules is waived to the extent necessary to allow C&W and its EBS lessors to maintain its operations as of April 30, 2007.
- This Waiver Request shall expire on April 17, 2015.

IV. CONCLUSION AND ORDERING CLAUSES

19. For the reasons discussed above, we conclude that C&W has demonstrated that partial grant of the requested waiver would be in the public interest. We further conclude that requiring C&W to transition to the new band plan would be inequitable, unduly burdensome and contrary to the public interest because it would be required to discontinue its existing service to customers.

20. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Sections 0.131, 0.331, 1.925 and 27.1231(g) of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331, 1.925, 27.1231(g), that the Request for Waiver filed by C&W Enterprises, Inc. on April 30, 2007 IS GRANTED to the extent indicated above, and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jane E. Jackson
Associate Chief, Wireless Telecommunications Bureau

⁵⁷ In the *BRS/EBS 4th MO&O*, the Commission corrected an error in Section 27.55(a)(4)(i) of the Commission's rules changing the reference from 47 dB[mμ]V/m to 47 dBμV/m. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 23 FCC Rcd 5992, 6023 ¶ 84 (2008).